Public Prosecutor v Prabu s/o Veeramuthu & Ors

HIGH COURT (SEREMBAN) — CRIMINAL TRIAL NO 45–3 OF 2005
ABDUL ALIM ABDULLAH J
27 FEBRUARY 2009

Criminal Procedure — Sentence — Culpable homicide not amounting to murder — Adequacy of sentence — Whether sentence to run concurrently or consecutively — Principles applicable — Whether offences were committed in course of single transaction — Criminal Procedure Code s 165(1)

The respondents were found guilty of culpable homicide not amounting to murder under s 304(a) read together with s 34 of the Penal Code and both were sentenced to 16 years imprisonment on each charge and the sentences to run concurrently from the dates of their arrests. The prosecution appealed to the court against the inadequacy of sentences imposed on the respondents. The prosecution had conceded that the offences as per the charges were committed in the same transaction but argued that the offences warranted sentences that should be consecutive. The main issue before this court was whether the sentences ought to be one that is concurrent or consecutive.

Held, dismissing the appeal:

(1) Sentences which are to run concurrently or consecutively would depend on the application of one of two principles. They are 'the one transaction principle' and the other is 'the totality principle'. In the 'one transaction principle', where two or more offences are committed in the course of a single transaction, all sentences in respect of these offences should be concurrent rather than consecutive. The 'one transaction principle' would see four elements present namely, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see paras 6, 7 & 9).

(2) The two offences committed by the respondents were all carried out in one single transaction. There was proximity of time in that the first victim was earlier murdered than the second victim, though at places not distant between each other (a 15 minute drive) when the latter was driven in the car to the other location where she was then later murdered by the respondents in their continuity of criminal action and

purpose or design. It was evident that the injuries inflicted upon the victims in that one transaction are remarkably similar and so too the causes of death (see paras 10–13).

(3) The injuries inflicted on the victims were vicious and would call for an outright condemnation. There was never any provocation by the victims. The court had taken into account of the guilty pleas by the respondents but the circumstances of this case would not permit any consideration for a lighter sentence (see paras 14 & 15).

[Bahasa Malaysia summary

Responden-responden didapati bersalah atas homisid salah yang tidak menjumlahkan kepada pembunuhan di bawah s 304(a) dibaca bersama dengan s 34 Kanun Keseksaan dan kedua-duanya dikenakan hukuman 16 tahun penjara untuk setiap pertuduhan dan hukuman akan dijalankan secara serentak dari tarikh penangkapan mereka. Pihak pendakwaan merayu kepada mahkamah terhadap ketidakcukupan hukuman yang dikenakan terhadap responden-responden. Pihak pendakwaan mengakui bahawa kesalahan seperti yang dituduh dilakukan dalam transaksi yang sama tetapi menghujah bahawa kesalahan-kesalahan tersebut mewajarkan hukuman yang sepatutnya berturutan. Isu utama di hadapan mahkamah ini adalah sama ada hukuman sepatutnya bejalan serentak atau berturutan.

Diputuskan, menolak rayuan:

(1) Hukuman yang sepatutnya berjalan secara serentak atau berturutan akan bergantung kepada pemakaian salah satu daripada dua prinsip. Ia adalah 'the one transaction principle' dan satu lagi adalah 'the totality principle'. Di dalam 'one transaction principle', di mana dua atau lebih kesalahan dilakukan semasa melakukan transaksi yang sama, kesemua hukuman berkaitan dengan kesalahan-kesalah tersebut sepatutnya serentak lebih daripada berturutan. 'One transaction principle' akan memerlukan kewujudan empat unsur iaitu, kedekatan masa, kedekatan tempat, kesinambungan tindakan dan kesinambungan tujuan atau cara (lihat perenggan 6, 7 & 9).

(2) Kedua-dua kesalahan yang dilakukan oleh responden-responden adalah dilakukan dalam satu transaksi. Terdapat kedekatan masa di mana mangsa pertama dibunuh dahulu sebelum mangsa kedua, walaupun di tempat-tempat yang tidak jauh di antara kedua-duanya di mana mangsa kedua dibawa dengan kereta ke lokasi yang satu lagi di mana dia kemudian dibunuh oleh responden-responden dalam kesinambungan tindakan dan tujuan atau cara jenayah. Ia jelas bahawa kecederaan yang

dilakukan terhadap mangsa-mangsa di dalam satu transaksi tersebut adalah secara luar biasa sama dan begitu juga sebab-sebab kematian (lihat perenggan 10–13).

(3) Kecederaan-kecederaan yang dilakukan kepada mangsa-mangsa adalah kejam dan adalah dikutuk sama sekali. Tidak terdapat apa-apa provokasi oleh mangsa-mangsa. Mahkamah telah mengambilkira pengakuan bersalah oleh responden-responden tetapi keadaan kes ini tidak membenarkan sebarang pertimbangan untuk hukuman yang lebih ringan (lihat perenggan 14 & 15).]

Notes

For cases on culpable homicide not amounting to murder, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3556–3560.

Cases referred to

Amrita Lal Hazra v Emperor 42 Cal 957 (refd)
Bhandulananda Jayatilake v PP [1982] 1 MLJ 83, FC (refd)
Chin Choy v PP [1955] MLJ 236, CA (refd)
Jayaraman & Ors v PP [1979] 2 MLJ 88, HC (refd)
Pendakwa Raya v Che Hassan bin Senawai [2005] 7 MLJ 357, HC (refd)
Pendakwa Raya v Ooi Kwang Lai [2000] 6 MLJ 622, HC (refd)
PP v Gunasekaran a/l Arjunan & Anor [2006] 5 MLJ 527, HC (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256, HC (refd)
Tan Bok Yeng v PP [1972] 1 MLJ 214, HC (refd)
Yit Kean Hong v PP [2005] 4 CLJ 592, CA (refd)

Legislation referred to

Child Act 2001 s 91(i)(h)
Criminal Procedure Code s 165(1)

Yong Leou Shin (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
S Kulasegaran (S Kula & Co) for the first respondent.
Sharif Mohamed (Sharif & Khoo) for the second respondent.
Kevin Mahendran (Kevin Mahendran & Co) for the third respondent.

Abdul Alim Abdullah J:

[1] All the three respondents had pleaded guilty to two amended alternative charges. They read as follows:

First amended alternative charge:

Bahawa kamu pada 28 Julai 2004 antara jam lebih kurang 12.30 tengah malam hingga 7.40 pagi, di Terusan, Mukim Juaseh di dalam Daerah Kuala Pilah dalam Negeri Sembilan, bagi mencapai niat bersama kamu semua telah menyebabkan

kematian ke atas CHONG PUI WAN (NO K/P: 861204-59-5128) dan dengan itu kamu telah melakukan homisid salah yang tidak terjumlah kepada kesalahan membunuh yang boleh dihukum di bawah Seksyen 304(a) Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun yang sama.

Second amended alternative charge:

Bahawa kamu pada 28 Julai 2004 antara jam lebih kurang 12.30 malam hingga 2.15 pagi, di kawasan tangki air, Taman Meranti, Bahau, di dalam Daerah Jempol, dalam Negeri Sembiian, bagi mencapai niat bersama kamu semua telah menyebabkan kematian ke atas PUK CHIA WEN (NO K/P: 850407-05-5021) dan dengan itu kamu telah melakukan homisid salah yang tidak terjumlah kepada kesalahan membunuh yang boleh dihukum di bawah Seksyen 304(a) Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun yang sama.

[2] The respondents were each sentenced to 16 years imprisonment on each charge and the sentences to run concurrently from the dates of their arrests. The public prosecutor has now appealed against the inadequacy of sentences imposed on the respondents.

[3] The facts as admitted by the respondents are as per exh P4.

[4] It can be discerned before me and from the submissions of both counsel for the appellant and respondents that the only issue is whether the sentences ought to be one that is concurrent or consecutive. Counsel for the respondents earnestly argued the former and the learned deputy public prosecutor, the latter.

[5] I must add, and early here too, that the learned deputy public prosecutor had conceded at the outset that the offences as per the charges were committed in the same transaction but argued that the offences warranted sentences that should be consecutive.

[6] I must now advert to the law on this. Sentences which are to run concurrently or consecutively would depend on the application of one of two principles. They are the one transaction principle and the other is the totality principle.

[7] In the one transaction principle, where two or more offences are committed in the course of a single transaction, all sentences in respect of these offences should be concurrent rather than consecutive.

[8] In the present case before me, the respondents had appropriately been

charged with two charges in the same trial and hence within the meaning of s 165(1) of the Criminal Procedure Code which provides as follows:

> (1) If in one series of acts so connected together as to form *the same transaction* more offences than one are committed by the same person, he may be charged with and tried at one trial for every such offence. (Emphasis added.)

The offences in this case meet the requirements of the above provision where the one transaction principle in sentencing does apply.

[9] The one transaction principle would see four elements present, namely, proximity of time, proximity of place, continuity of action and continuity of purpose or design (see *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88; *Amrita Lal Hazra v Emperor* 42 Cal 957; *Chin Choy v Public Prosecutor* [1955] MLJ 236).

[10] In the present appeal, the two offences committed by the respondents were all carried out in one single transaction in the wee hours of 28 July 2004. There was proximity of time in that the first victim was earlier murdered to the second victim, though at places not distant between each other (a 15 minute drive) when the latter was driven in the car to the other location where she was then later murdered by the respondents in their continuity of criminal action and purpose or design.

[11] The facts of the case would indicate that the male victim's hands and mouth were tied with a T-shirt cloth and was beaten and in the robbery the following remarkable injuries are evident from the post mortem report and are reproduced herein below:

Marks of injury

(1) Abrasion wound 2 x 0.3cm on the right side of the chin.

(2) An incised wound 10.5 x 3.5cm over the front of the neck, 6.5cm above the supra-sternal notch. The trachea was completely severed. The left jugular vein was cut but the carotid arteries were intact on both sides.

(3) A superficial incised wound 4 x 1cm involving only the skin was noted 1cm distal to wound No 2 on its right side.

(4) Abrasions 11 x 3cm and 4 x 2cm over the tips of the right and left shoulders respectively.

(5) Bruise 7 x 6.5cm on the back of the right shoulder.

(6) Three vertically placed stab wounds in the upper abdominal area in the midline, above the navel. The uppermost of these stab wounds measured 5.5 x 1.7cm and was 9.5cm deep. The direction of thrust was from front to back and from left to right. Immediately below was another stab wound that measured 3.5 x 1.5cm and was 8cm deep. It was also directed from front to back and from left to right. To the left of these two wounds was another stab wound measuring 5 x 1.8cm and with a depth of 8cm with the same wound trajectory as the first mentioned stab wounds.

(7) A stab wound 5cm below the navel which measured 1.2 x 0.7cm with a depth of 2.3cm. This wound did not breach the abdominal wall.

(8) Bruises 4 x 3cm and 1 x 1cm over the inner aspects of the right and left knees respectively.

(9) Abrasion 10 x 2.5cm on the lateral aspect of the left rib cage.

(10) Abrasion 3 x 4cm on the lateral aspect of the right rib cage.

(11) Small abrasion wounds seen on the back of both wrists. An abraded bruise 2 x 1cm on the back of the left forearm.

(12) Bruise 3.5 x 2.5cm on the back of the right hand.

(13) Multiple linear abrasion wounds seen on the arms, the back and sides and the right front part of the body. These wounds were of varying dimensions and orientation.

Some of the victim's internal injuries are set out below:

Mouth, Throat & Neck Structures

Carotids	The carotid arteries were intact. The left jugular vein was incised.
Cervical muscles	The anterior neck muscles were cut.

Thorax

Trachea & air passages	The trachea was severed. Some blood and mucus seen in the lower bronchi.
Lungs	The right and left lungs weighed 350gm and and 350gm respectively. The lungs were intact. Cut sections of the lungs showed presence of blood in the smaller airways.

Abdomen

Peritoneum	There was 400ml of blood in the peritoneal cavity.

Stomach	Three stab wounds were noted on the stomach-two were seen near the lower curvature and another at the upper curvature. The more proximal wound also showed a penetration of the omentum and an injury to the upper pole of the right kidney. The stomach contained some partially digested noodle meal mixed with altered blood.
Kidney	The left kidney was healthy. There was bleeding around the right kidney from the injury to the upper pole.

Summary and conclusions

(1) The body was that of a young Chinese adult male positively identified by his brother as the above named.

(2) There was an incised wound over the neck. There were stab wounds over the abdominal region. Other injuries in the form of abrasions and bruises were seen on the body and limbs of the deceased.

(3) Internal examination showed a severed trachea and veins of the neck. There were injuries to the stomach and its omentum and to the right kidney as a result of the stab wounds over the abdomen.

(4) There was no disease process in the deceased's body that could have contributed to his death at that particular moment in time.

The cause of death was the incised wound over the neck.

The female victim was driven to another spot by the respondents where, in similar fashion she was stabbed in the abdomen and neck. She was then put in the boot of the car which was then pushed into a lake but the car got entangled at the fringes whereupon the victim was taken out of the boot and dumped into the water. Here are some of the injuries (and cause of death) as revealed in the post mortem report:

Marks of injuries

(1) An incised wound over the front of the neck measuring 11 x 5cm seen just above the level of the thyroid cartilage. Two superficial cuts were seen above and also on the left upper edge of this injury. The trachea was severed. The left common carotid artery was severed 12.5cm above the level of the aortic arch. The left jugular vein was also incised.

(2) An intra-dermal bruise 1.5 x 0.3cm on the left side of the chin.

(3) A bruise 1 x 1cm on the left elbow.

(4) A stab wound on the left side of the abdomen measuring 5.2 x 2.5cm

seen 29cm below the left collarbone and 6.5cm left of the midline. This wound was 10cm deep and directed front to back.

(5) A bruise 1.5 x 1cm on the anterior aspect of the right forearm.

(6) A bruise 2 x 1cm on the frontal aspect of the right shin.

The internal injuries reveal:

Head

Scalp:	There was a subgaleal hematoma measuring 2 x 3cm over the right parieto-occipital area of the scalp.

Mouth, Throat & Neck Structures

Carotids:	The left common carotid artery and the left jugular vein were severed.
Cervical muscles:	The anterior neck muscles were cut.

Thorax

Trachea & air passages	The trachea was severed.

Abdomen

Stomach	The was a stab wound at the lower curvature of the stomach. The stomach wall was not breached. There was some digested noodle meal in the stomach.
Colon	There was a stab wound of the outer wall of the colon at the splenic flexure.

Summary and Conclusions

(1) The body was that of a young female Chinese adult positively identified by her brother as the above named.

(2) There was an incised wound on her neck severing the left common carotid artery, the left jugular vein and the trachea. There was also a stab wound to the abdomen that did not injure any vital structures.

(3) There was no injury to the genitalia. Some bruises were seen on the chin, on both arms and on the right lower limb.

(4) The injuries to the structures in the neck were fatal.

The cause of death was the incised wound over the neck.

It is evident that the injuries inflicted upon the victims in that one transaction are remarkably similar and so too the causes of death as opined by the forensic pathologist (see P17 and P18). The injuries inflicted in the

course of the robbery would call for an out right condemnation as to its severity. I would pause here to add that the learned deputy public prosecutor had strenuously argued that while conceding that the crimes were committed in one transaction, she had in the same urged the court that consecutive sentences be imposed. The closest and most heavily relied authority that she proffered is the Court of Appeal decision of *Yit Kean Hong v Public Prosecutor* [2005] 4 CLJ 592. The appeal court therein had affirmed the consecutive sentence imposed by the trial court. Upon a closer scrutiny it can be said that the facts of that case differ and are quite distinguishable from the present one before me. In that case the offences were distinct. The first victim survived the ordeal despite slash wounds to the neck while the second victim was set on fire and died of 'septicemia secondary to 60% burns'. In coming to a decision, the Court of Appeal therefore did not depart from the principles of concurrent and consecutive sentencing. 'The victims suffered two different types of injuries and the methods of inflicting them on the two victims were also different from each other', per Nik Hashim JCA (as he then was). On the above authority, this court would therefore consistently follow and be guided thereby.

SENTENCING PRINCIPLES

[12] Public interest is paramount. In *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 at pp 256–257 Justice Hashim Yeop A Sani has this to say:

> One of the main considerations in the assessment of sentence is of course the question of public interest. On this point i need only quote a passage from the judgment of Hilbery J in *Rex v Kenneth John Ball* as follows:
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> > In deciding the appropriate sentence a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the court has the right and the duty to decide whether to be lenient or severe.

Presidents and magistrates are often inclined quite naturally to be over-sympathetic to the accused. This is a normal psychological reaction to the situation in which the lonely accused is seen facing an array of witnesses with authority. The mitigation submitted by a convicted person will also normally bring up problems of family hardship and the other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This in my view is a wrong *approach*. The correct approach is to strike a balance, as far as possible, between the interests of the public and the interests of the accused. Lord Goddard LCJ in *Rex v Grondkowski* offered some good advice when he said:

> The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners.

[13] Justice Sharma in *Tan Bok Yeng v Public Prosecutor* [1972] 1 MLJ 214 appropriately and remarkably made known at p 215:

> The second accused was 20 years of age while the appellant was 25 years at the date of the commission of the crime. I am quite aware that the law does provide for a lesser sentence or no sentence at all be imposed upon persons of young age. *There has, however, emerged in recent years in our society certain species of crimes which the alacrity of mind and body, the dare, dash and defiance of the youth alone is capable of performing and producing*. Law cannot, in my view, remain merely a static and a meaninglessly passive, if ornamental and an orthodox instrument of justice, ineffective in its results and application. The social needs of the times have to be met and effectively met. It is not merely the correction of the offender which is the prime object of punishment. The considerations of public interest have also to be borne in mind. In certain types of offences a sentence has got to be deterrent so that others who are like-minded may be restrained from becoming a menace to society. (Emphasis added.)

[14] The injuries inflicted on the victims were vicious and would call for an outright condemnation. There was never any provocation by the victims. In like situation, in *Pendakwa Raya v Ooi Kwang Lai* [2000] 6 MLJ 622; *Public Prosecutor v Gunasekaran a/l Arjunan & Anor* [2006] 5 MLJ 527 and *Pendakwa Raya v Che Hassan bin Senawai* [2005] 7 MLJ 357 prison sentences of 15, 20 and 19 years respectively were handed down.

[15] This court had taken into account of the guilty pleas by the respondents but the circumstances of this case would not permit any consideration for a lighter sentence. I must refer to what Augustine Paul J (as he then was) had said in *Pendakwa Raya v Ooi Kwang Lai*:

Walaupun demikian, diskaun untuk pengakuan salah ini hanyalah merupakan satu kenyataan bersifat peraturan yang umum sahaja dan bukannya satu kemestian untuk semua kes. Pengakuan salah ini hanya boleh memihak kepada tertuduh apabila lain-lain faktor dan keadaan di mana sesuatu kesalahan itu dilakukan mengizinkan pertimbangan sedemikian diberikan kepada tertuduh. Tidak ada peraturan yang menyatakan sesuatu pengakuan salah itu akan secara automatik membolehkan tertuduh mendapat hukuman yang lebih ringan. Kadangkala di dalam kes-kes tertentu, faktor kepentingan awam mengatasi segala faktor mitigasi yang diberikan dari pengakuan salah tertuduh. Lord Lane CJ di dalam kes *Sharon Elizabeth Costen* 1989 11 Cr App R (S) CA 182 telah menyatakan (di ms 184), 'But there are certain exceptions, likewise well authenticated in the authorities, to that general rule that discount will be allowed for a plea of guilty. The first and most important exception is the protection of the public. Where it is necessary that a long sentence, if necessary the maximum sentence, should be passed in order to protect the public, in those circumstances a plea of guilty may not result in any discount'.

In the above case the sentence imposed was 15 years from the date of arrest.

[16] It is useful to pause and reflect on the Federal Court case of *Bhandulananda Jayatilake v Public Prosecutor* [1982] 1 MLJ 83 where Raja Azlan Shah Ag LP (as he then was) said:

As this is an appeal against the exercise by the learned judge of a discretion vested in him, *is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description*? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v Jamieson*). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. *It is for that reason also that this court has said it again and again that it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, per se, to warrant this court's interference.*

For a discretionary judgment of this kind to be reversed by this court, it must be shown to our satisfaction that the learned judge was embarking on some unauthorised or extraneous or irrelevant exercise of discretion. (Emphasis added.)

[17] The third respondent was 16 years 11 months old at the time of the commission of the offences, the others being adults then whose ages were 18 years 5 months and 18 years 11 months old. The third respondent was a

A 'child' within the meaning of the Child Act 2001 and by virtue of s 91(i)(h) of that Act, this court could impose a custodial sentence on children aged 14 years and above.

B **[18]** This court thus sees fit to pass the sentences as it did in the circumstances of this case.

Appeal dismissed.

C Reported by Ashgar Ali Ali Mohamed

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